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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 THE NEW YORK TIMES COMPANY,

4 Plaintiff,

5 v.

16-cv-3098 (JSR)

6 CENTRAL INTELLIGENCE AGENCY,

7 Defendant.

8 -----x  
9 New York, N.Y.  
10 August 24, 2016  
11 4:00 p.m.

12 Before:

13 HON. JED S. RAKOFF

14 District Judge

15 APPEARANCES

16 THE NEW YORK TIMES COMPANY  
17 BY: DAVID E. McCRAW, ESQ.  
TALI R. LEINWAND, ESQ.

18 LEIGH A. WASSERSTROM, ESQ.  
19 Assistant United States Attorney  
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(In open court)

THE CLERK: This is *The New York Times* v. The Central Intelligence Agency, Docket No. 16 Civil 3098. Will everyone please be seated and will the parties please identify themselves for the record.

MR. McCRAW: David McCraw for *The New York Times*, plaintiff.

MS. LEINWAND: Good afternoon. Tali Leinwand for *The New York Times*.

THE COURT: Good afternoon.

MS. WASSERSTROM: Leigh Wasserstrom from the United States Attorney's Office for the CIA.

THE COURT: This is a cross motion, so it doesn't really matter who goes first, but why don't we hear first from the government.

MS. WASSERSTROM: Thank you, your Honor. This case arises from the CIA's *Glomar* response in response to requests for three purported records. Those reports are dated September 2006, March 2007, and August 2007.

THE COURT: I haven't had a *Glomar* response previously, and it creates an unusual situation in my view because, in previous cases, I've been able to examine in camera where there is a document whose existence is acknowledged, and that often allows me to either determine that there would be problem under FOIA in releasing the document or, many times,

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1 that redactions can solve the problem or something like that.  
2 Here, your position is that to merely acknowledge whether there  
3 is or is not such a document would compromise national  
4 security, yes?

5 MS. WASSERSTROM: That's correct, your Honor.

6 THE COURT: How could that be, when there has already  
7 been some disclosures of similar documents, such as a CIA  
8 report drafted in January 2005 and classified in November 2013  
9 that concluded that small numbers of forgotten, discarded, or  
10 demilitarized chemical weapons from Iraq's pre-1991 stockpile  
11 continue to surface and pose a modest threat to coalition  
12 forces?

13 MS. WASSERSTROM: Your Honor, the issue before the  
14 court in a *Glomar* case is the plausibility of the CIA's  
15 justification for its *Glomar* response.

16 THE COURT: Well, that's what I'm asking. I agree  
17 that's the standard. How can it be plausible, when we have  
18 some disclosures already, not to mention I seem to have a vague  
19 recollection the whole reason we went into Iraq was to do away  
20 with weapons of mass destruction, so it would hardly be  
21 surprising that we were continuing to look for them and unearth  
22 them and so forth.

23 MS. WASSERSTROM: The basis for the CIA's *Glomar*  
24 response here is that the classified fact is the CIA's  
25 intelligence interest, if any, at the particular time of the

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1 purported dates of --

2 THE COURT: What is it about the particular time that  
3 implicates national security in a way that, for example, the  
4 time that I just referred to does not?

5 MS. WASSERSTROM: The reason why the CIA's interest in  
6 a particular time is classified or is not classified is not  
7 something the CIA can disclose in its declaration publicly.  
8 But that's not required under the standard.

9 THE COURT: Yes. But now we're not in a realm of  
10 plausibility. Now we're in the realm of Trust me. You're  
11 saying, if I understand it -- correct me if I'm wrong -- we  
12 agreed there were some disclosures of similar kinds of things,  
13 such as the one I just mentioned, at a different time; we  
14 agree, but we think that disclosure of any -- if there was such  
15 a document in existence during this particular time, which was,  
16 I think, December 2006 through August 2007, that, unlike the  
17 earlier period, which was January 2005, would compromise  
18 national security. And the reason for that is, we can't tell  
19 you.

20 MS. WASSERSTROM: I think a couple of points to make,  
21 your Honor. First, the CIA's intelligence interests at a  
22 particular time versus another time, it's plausible on its face  
23 that the CIA would have an interest in particularly a later  
24 time period but not an earlier.

25 The other thing I want to draw the Court's attention

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1 to is the nature of the public documents the Times has  
2 submitted in support of its motion, in particular the  
3 plausibility that disclosure of the existence or nonexistence  
4 of these purported records -- and the difference, namely,  
5 between the documents that have been submitted.

6 I think your Honor pointed to, I think it's Exhibit J?

7 THE COURT: Yes.

8 MS. WASSERSTROM: Right. That document is titled  
9 "Iraq's WMD Retrospective Theory." That document, even on its  
10 face --

11 THE COURT: Let me just pull it out. Hold on a  
12 second.

13 MS. WASSERSTROM: Sure.

14 THE COURT: Go ahead.

15 MS. WASSERSTROM: So that document is "Iraq's WMD  
16 Retrospective Theory." That document and I think the previous  
17 exhibit, Exhibit I, another document from a retrospective  
18 theory, those are the CIA documents that the Times has provided  
19 that are closest in time to the relevant time period we've  
20 identified here. I think both documents note that what those  
21 documents are are retrospective analyses of past assessments in  
22 light of investigations done by the Iraq survey group.

23 THE COURT: Yes. I think that may be. But it goes  
24 all the way up to, for example, I'm looking at page Exhibit J,  
25 the fourth page of the document. "This IA seeks to address the

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1 existence of an undeclared Iraqi chemical warfare effort or  
2 chemical weapons stockpile in the period between 1991 and  
3 2003." So it's at least up through 2003, yes?

4 MS. WASSERSTROM: The analysis, I'm not -- we would  
5 agree with that.

6 I think that it's helpful also to look at, as alleged  
7 in the complaint, the titles of the documents, the purported  
8 titles of the documents that the Times has reflected here.  
9 Those purported records, based on their titles and dates,  
10 appear to reflect a CIA intelligence interest at a particular  
11 time in a particular place on very specific topics. And they  
12 would likewise tend to reflect the existence of human sources  
13 and specific collection methods. That type of information does  
14 not appear in any of the documents that the Times has provided  
15 to the Court. And the general information that's in the  
16 documents that have been provided as exhibits to the Times'  
17 motion provide general information as to the CIA's interest in  
18 an earlier time period, and the analysis reflected therein are  
19 retrospective.

20 THE COURT: So how do we know that the document that  
21 may or may not exist that they're asking for isn't of the same  
22 nature?

23 MS. WASSERSTROM: The *Glomar* response is predicated on  
24 the fact that their existence or nonexistence is itself  
25 classified because the CIA's intelligence interest, if any,

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1 during that time period is properly classified.

2 THE COURT: Yes. These reports show, while they may  
3 be retrospective, they indicate that there was an intelligence  
4 interest up through the time of the authorship of these  
5 documents, yes?

6 MS. WASSERSTROM: They may. They do reflect --

7 THE COURT: So what changed?

8 MS. WASSERSTROM: The legal standard and the case law  
9 makes clear that general disclosures do not undermine the  
10 CIA's -- the plausibility of a declaration that states that the  
11 fact of the existence --

12 THE COURT: No, no. Forgive me, but I really don't  
13 understand that. Let's take an extreme case. Supposing you  
14 had a disclosure that was dated January 30, 2005 and then  
15 someone asked for a document that they believed existed that  
16 was created on January 31, 2005, and you're saying that it  
17 would still be plausible to assume that somehow the existence  
18 of an intelligence interest that was disclosed on January 30,  
19 that it was plausible nevertheless to believe that a disclosure  
20 as of January 31 would somehow compromise national security  
21 because it would show that a day later, the same intelligence  
22 interest that had already been disclosed still existed? That's  
23 absurd.

24 MS. WASSERSTROM: I think this case is different than  
25 that.

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1 THE COURT: I agree it's different. But I don't think  
2 it can be dealt with just as a matter of presumption, as my  
3 hypothetical shows.

4 MS. WASSERSTROM: I think that the presumption,  
5 though, is not just in terms of the time period, which, in this  
6 case you have analyses that may be dated January 2005 or  
7 January 2006 but reflect an interest --

8 THE COURT: Right. But I don't know if that's equally  
9 true of a document that may or may not exist that's in  
10 question. This is why I say this is a funny approach. And  
11 obviously I respect the ability of the government to make a  
12 *Glomar* response, but they have to justify it. It's a totally  
13 different situation, a much more easy situation for a court to  
14 deal with, when the government says, without disclosing to the  
15 person seeking the document, the petitioner, the existence or  
16 nonexistence, we will show it to the court and the court can  
17 then see that it has a -- but that's not the approach you're  
18 taking. Now, you're free to take the *Glomar* approach. But  
19 then I think it puts you at the disadvantage of having to show  
20 plausibility not just through vague references to presumptions  
21 but through some other fact.

22 For example, if the government of Iraq had changed  
23 from a pro-American to an anti-American government during that  
24 period, then that would raise some plausibility. But we don't  
25 have any of that stuff here.



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1 MS. WASSERSTROM: I do want to point out for your  
2 Honor just that in a *Glomar* case, the presumptions are very  
3 strong in favor of the government in terms of what it needs to  
4 show to justify the *Glomar*, and it is not the presumption that  
5 the government needs to explain why the fact on which the  
6 *Glomar* is predicated is properly classified. It's enough that  
7 it is plausibly classified. And the CIA's interest in a  
8 particular time period that is significantly --

9 THE COURT: Again, I'm having a little trouble  
10 understanding that. So when, in a situation where the  
11 government has acknowledged, at least to the court if not to  
12 the requesting party, that there is such a document, here it is  
13 for in camera review, and then the court can immediately see,  
14 oh, this is so different and it involves matters that are of  
15 national intelligence and so forth, you're saying that,  
16 instead, the presumptions should be strong against disclosure  
17 where the court has been furnished with nothing, not even an  
18 acknowledgment there is such a document, but is being told in  
19 effect, we can't tell you anything about this, even whether it  
20 exists, but trust us, if it did exist -- or, excuse me -- trust  
21 us that to acknowledge whether it existed or not would  
22 compromise national security, although we can't tell you why in  
23 any respect.

24 MS. WASSERSTROM: I think that, two things. First of  
25 all, the CIA's position in *Glomar* cases as a presumption is

1 that providing an in camera or classified declaration to the  
2 court is not required under the legal standard in which the  
3 assessment of harm is entrusted to the agency.

4 THE COURT: No, it's not required. But it certainly,  
5 in my experience and I think the experience of most judges,  
6 turns what is otherwise vague and conclusory into something  
7 where plausibility is immediately determinable. So it's not  
8 required, but it puts you in the position of having to rely on  
9 what may be so vague as to not be convincing on the subject of  
10 plausibility, notwithstanding presumptions.

11 MS. WASSERSTROM: However, submitting a classified  
12 declaration or a declaration for in camera ex parte review  
13 itself can undermine the protection that *Glomar* provides to the  
14 CIA.

15 THE COURT: Only if it's disclosed, if the fact of the  
16 production is disclosed to the party requesting the document,  
17 right? In other words, what you could have done in this case  
18 was say to the Court, we are going to present you with a  
19 document and accompanying affidavit on a strictly ex parte  
20 basis and we're not going to disclose that we're doing that,  
21 we're not even going to acknowledge that, but we give it to you  
22 so that the Court, instead of dealing with all these sort of  
23 vague situations, can assess the situation for what it's worth.  
24 That wouldn't even acknowledge to the adversary that such a  
25 document exists. But that wasn't the path you chose.

1 MS. WASSERSTROM: That's right.

2 I do want to highlight one other issue which I think  
3 bears on the national security analysis, which is, under  
4 exemption 3, the issue before the Court really is the  
5 plausibility that revealing the existence or nonexistence could  
6 reveal sources or methods. There is no additional showing of  
7 harm to national security required to invoke that exemption. I  
8 think the declaration amply does that, and explaining that  
9 revealing the existence of sources --

10 THE COURT: Well, I hear you, and exemption 1 --  
11 you're invoking two exemption, exemption 1 and exemption 3.  
12 Exemption 1 has two elements, does it not? That the document  
13 or, in this case, the existence or nonexistence of the document  
14 pertains to intelligence activities -- that is, I think,  
15 conceded -- and, secondly, that unauthorized disclosures of the  
16 information could reasonably be expected to cause identifiable  
17 and describable damage to the national security. Isn't that  
18 right?

19 MS. WASSERSTROM: That's correct, your Honor. But  
20 courts have held that that determination is entrusted to the  
21 agencies and under exemption 3 no additional showing of harm is  
22 necessary. It's just that it falls within the exempting  
23 statute, which in this --

24 THE COURT: I don't know. I hear what you're saying.  
25 What case are you relying on that's binding on this Court for

1 that proposition?

2 MS. WASSERSTROM: I think if you look at the *ACLU v.*  
3 *FCI* case -- I'm sorry. Even in *Florez*, I believe the Second  
4 Circuit discussed that issue too.

5 THE COURT: Point me to where.

6 MS. WASSERSTROM: Sorry. I'm just looking through my  
7 cases.

8 *Larson*, the D.C. Circuit case that we cite in our  
9 brief.

10 THE COURT: I'm sorry?

11 MS. WASSERSTROM: *Larson*. It's the D.C. Circuit case  
12 we cite in our brief for that proposition.

13 THE COURT: Yes. And of course that's a case I must  
14 take account of but it's not binding on this Court.

15 MS. WASSERSTROM: I'm sorry. I don't have the  
16 citation.

17 THE COURT: OK. I'll take another look at that issue.

18 I've exhausted the questions I had. Maybe we should  
19 turn to your adversary unless there were other things you  
20 wanted to raise with the Court.

21 MS. WASSERSTROM: No, your Honor. Thank you.

22 THE COURT: Thank you very much.

23 MR. McCRAW: Thank you, your Honor.

24 THE COURT: So you're no longer, if I read your papers  
25 correctly, maintaining there was a waiver here?

1 MR. McCRAW: Yes, your Honor. That is correct. I  
2 guess I'm a victim of my own success in arguing *Florez*. *Florez*  
3 has, I think, now clarified that when we talk about official  
4 acknowledgment we're talking about waiver, we're talking about  
5 acknowledgment of a particular document. But the great thing  
6 about *Florez* in our opinion is, it has clarified that these  
7 other disclosures, disclosures by the agency or disclosures by  
8 other government entities, are part of the second step in the  
9 analysis, which is, as you were focusing on, your Honor, in the  
10 questions, the justification.

11 Here, the government relies ultimately on this time  
12 distinction. Nothing in their declaration speaks to that, not  
13 that specific time, not time in general. Ms. Wasserstrom  
14 raised the issue of the titles of the documents, and I think  
15 it's very important to look at those because they dovetail  
16 with, I think, the point you were making, your Honor.  
17 "Recovered CW Munitions Probable Remnants of Pre-1991 CW  
18 program," that's the title. That fact is disclosed in the very  
19 document that you were discussing, Exhibit J. Exhibit J is a  
20 CIA document. That's what it talks about, is pre-1991  
21 remnants. The second one, "Recovered Pre-1991 Mustard Rounds  
22 May Pose Localized Threat," that is a fact disclosed in Exhibit  
23 J you cited in your question.

24 The third one, though, probably tells us a lot about  
25 this case. The third one is "U.S. Forces Experience First

1 Sulfer-Mustard Related Injuries," March 2007. That is not a  
2 secret. The army has acknowledged that. The army has talked  
3 about its disgraceful handling of these cases. 600 or more  
4 Marines and soldiers injured.

5 Part of the reason I bring up these titles is to point  
6 out that acknowledging the documents has nothing to do with  
7 sources and methods. These documents can be acknowledged and  
8 never mention sources, never mention methods.

9 It may be the government ultimately prevails here. It  
10 may be that in the document itself sources and methods are  
11 such. But at this point, the issue is whether acknowledgment  
12 of the existence or nonexistence of documents reveals a  
13 national security threat. They have not made that case.

14 We have heard today an attempt to sort of polish this  
15 idea of time as a factual question that's for the declarant.  
16 The declarant could have and chose not to. I've been involved  
17 in *Glomar* cases, including *Florez*, including *New York Times v.*  
18 *DOJ*. The government in those cases put in classified  
19 declarations. The government in those cases have put in reply  
20 declarations after we did exactly what we did here, say, look,  
21 it's your document. They have chosen to rely on a declaration  
22 that is filled with generalities. And the court, the Second  
23 Circuit, was very clear on that when it said that "a *Glomar* is  
24 allowed only in 'unusual circumstances' with a particularly  
25 persuasive affidavit." I do not believe that we have here a

1 particularly persuasive affidavit.

2 As we set forth in our papers, it seems clear that  
3 failure to address the disclosures and show why conceding or  
4 denying these documents exist would disclose any national  
5 security secret that hasn't already been officially disclosed  
6 from our laundry list of ten or twelve declarations or ten or  
7 twelve documents.

8 And with that, your Honor, I will rest.

9 THE COURT: All right. Very good. Anything else that  
10 the government wanted to add?

11 MS. WASSERSTROM: If I may, your Honor, just a couple  
12 of quick points.

13 THE COURT: Yes.

14 MS. WASSERSTROM: I think the government has made a  
15 showing that revealing the existence or nonexistence of these  
16 documents would reveal sources and methods. I think the case  
17 law is clear that the existence of sources or the existence of  
18 methods is itself protected under exemption 3 in a *Glomar*  
19 context. I just want to point the Court's attention to those  
20 cases, in particular *Gardels*, *Wolf*, *ACLU v. FCI*, and *Wilner*. I  
21 think those cases are important to remember that the  
22 declaration statement that sources and methods would be  
23 implicated by revealing the existence or nonexistence of these  
24 documents can't be rebutted simply by a statement by the Times  
25 that it doesn't understand or see how that's possible.

1           Furthermore, given the titles of the documents, which  
2           refer to things like CIA WIRE reports, it's entirely plausible  
3           that revealing the existence or nonexistence of these documents  
4           would reveal the types of sources and methods that are  
5           protected by exemption 3.

6           THE COURT: Doesn't that prove too much? If I  
7           understand your argument, the mere fact that the CIA has  
8           authored a document, of any kind, on any subject whatsoever, by  
9           the fact that it's the CIA, implicates national security and  
10          could cause injury because only the CIA in your view can  
11          determine whether it would cause injury or not. Maybe I'm  
12          misunderstanding your argument. It sounds like the Court is  
13          merely a potted plant, to use a very misused cliché.

14          MS. WASSERSTROM: The Court is not a potted plant from  
15          the agency's perspective at all. But I think that the case law  
16          is clear that revealing the existence or the fact of -- sorry,  
17          I want to say this right -- revealing the existence or  
18          nonexistence of these documents would reveal a CIA interest, if  
19          any, and by revealing the target of the CIA's intelligence-  
20          gathering operations, etc., the case law is very clear that  
21          that can implicate sources and methods in a very plausible way.  
22          And there are cases that take a very similar approach to  
23          requests, in finding that sources and methods under exemption 3  
24          are implicated in a *Glomar* context. And I point the Court to  
25          those cases which I think highlight that issue in particular.



1 THE COURT: But just so I understand, I can understand  
2 that in certain contexts. I'm having difficulty understanding  
3 it in this context. How does disclosing the fact that there  
4 was, if there was, a document written in 2007 or whatever it  
5 was, about or concerning disclosures in 2006, 2007 about the  
6 existence of or discovery of or treatment of harms visited by  
7 Saddam Hussain-stockpiled chemical weapons that were uncovered  
8 somehow compromise, the fact that there was such a report  
9 somehow compromises national security in a way that the  
10 acknowledgment of a report that's already public record from a  
11 year or so earlier did not compromise national security? How  
12 can that be?

13 MS. WASSERSTROM: I think that the point is that the  
14 acknowledgment of the CIA's interest at that time or the  
15 existence, if any, the acknowledgment of an existence would  
16 tend to suggest that the CIA -- this is in the declaration, so  
17 I'm really just pointing the Court to portions of the  
18 declaration.

19 THE COURT: Yes.

20 MS. WASSERSTROM: But if the CIA were to confirm that  
21 these documents existed, it would tend to reveal that the CIA  
22 had human sources at a particular time that have otherwise not  
23 been disclosed. And this is paragraph 30.

24 THE COURT: It would tend to reveal that the CIA had  
25 sources in Iraq -- oh, my God, what a surprise -- and somehow

1 revealing that would be compromising in a way that the already  
2 disclosed record of such sources in 2005 did not compromise?

3 MS. WASSERSTROM: The case law makes very clear that  
4 seemingly small or trivial pieces of information that are not  
5 in the public record can cause cognizable harm.

6 THE COURT: I understand that totally and that's why,  
7 if there were such a document, this Court would want to very  
8 carefully examine it in camera and might well conclude that  
9 none of it could be disclosed or might well conclude that only  
10 small portions of it could be disclosed or whatever. But  
11 that's not what we're talking about today. What we're talking  
12 about today is whether the mere acknowledgment of the existence  
13 of such a document can compromise national security.

14 MS. WASSERSTROM: Can compromise sources, methods, and  
15 potentially in a way harmful to national security.

16 THE COURT: It seems to me your declarations don't  
17 deal with that in any particularized way. If I had a  
18 declaration that said there were significant changes in the  
19 government of Iraq or in the international situation, so that  
20 the disclosures that have already been made from a year or so  
21 earlier, the Court could well plausibly imagine that the  
22 situation was very different or materially different in 2006-7  
23 than it was in 2005. But I don't have that kind of  
24 declaration. What I have is just simply boilerplate -- forgive  
25 me -- of generalities that sometimes that could be the case:

1 Well, yes, sometimes it can and sometimes it can't. And the  
2 presumptions are not conclusive. They are relevant. But the  
3 Court ultimately has to make a determination of whether there  
4 is anything there beyond vague generalities.

5 MS. WASSERSTROM: One final point, your Honor. In  
6 terms of whether this is a vague declaration, boilerplate,  
7 generality, this is addressed in the *Larson* case too, the fact  
8 that national security cases raise similar concerns that may  
9 require the CIA to use language that may seem boilerplate or  
10 rote to the Court is frankly part of the nature of the national  
11 security --

12 THE COURT: Yes, I understand, but, you see, it's a  
13 bootstrap argument, because what follows from that is that all  
14 the CIA ever has to do to avoid having to even disclose the  
15 existence of any document is to raise generalities about the  
16 possibility that every document or any document could  
17 conceivably, by its acknowledgment, compromise national  
18 security. That proves too much. That is what I meant by "the  
19 potted plant." That means that the Court simply has to accept  
20 generalities that would cover every document in every situation  
21 and the CIA never has to disclose anything under FOIA. And  
22 that cannot be the law.

23 MS. WASSERSTROM: Of course that's not the law. And  
24 the CIA has taken a close look at the issues here, that the  
25 *Glomar* response is in good faith, and believes that it is

1 properly justified on the basis of this declaration.

2 THE COURT: Thank you.

3 MS. WASSERSTROM: Thank you, your Honor.

4 MR. McCRAW: Your Honor, may I respond to the  
5 exemption 3 point and where when it is appropriate in *Glomar*?

6 THE COURT: Yes.

7 MR. McCRAW: *Wilner* is a good example. Counsel  
8 pointed that out. The request in *Wilner* came from some law  
9 professors after warrantless wiretapping was disclosed, I'll  
10 mention by *The New York Times*. What they requested was this:  
11 "records obtained or relating to ongoing or completed  
12 warrantless electronic surveillance or physical searches  
13 regarding, referencing, or concerning any other plaintiffs."  
14 You cannot answer that without acknowledging that there is  
15 surveillance. That's when 3 would come into play. That's not  
16 our request.

17 Thank you, your Honor.

18 THE COURT: Thank you.

19 Did the government counsel want to say anything on  
20 exemption 3? I should have asked you that before.

21 MS. WASSERSTROM: No. Thank you, your Honor. I think  
22 that the Second Circuit cases in terms of the exemption 3 and  
23 the harm in *Wilner* is the applicable standard.

24 THE COURT: Very good.

25 I thank counsel for both sides for their very helpful

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arguments. I will take the matter sub judice.

MR. McCRAW: Thank you, your Honor.

MS. WASSERSTROM: Thank you, your Honor.

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